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No. 03-1321

In the Supreme Court of the United States

ROTEC INDUSTRIES, INC., PETITIONER
v.
MITSUBISHI CORPORATION,
TUCKER ASSOCIATES, INC., AND GARRY TUCKER

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the granting of summary judgment by a federal court on a state law claim categorically constitutes a violation of the Full Faith and Credit Clause and the Seventh Amendment right to a jury trial where the Petitioner merely asserts that the District Court misapplied state law in finding no evidence of causation.

2. Whether the mere fact that a U.S. company unsuccessfully bid on a foreign contract in a foreign country against foreign competitors gives rise to a claim under Section 2(c) of the Robinson-Patman Act against those foreign competitors where the jurisdictional prerequisite for that claim requires that the foreign competitor "be engaged in" the flow of interstate commerce and have committed the prohibited activity "in the course of such commerce."

3. Whether the Ninth Circuit's 38-year-old precedent which held that the jurisdictional requirements of Section 2(c) of the Robinson-Patman Act were satisfied by an "effect on commerce" was correctly overruled in light of the Court's decision in *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186 (1974), holding that an "effect on commerce" was not enough to satisfy the identical language in Section 2(a) of the Robinson-Patman Act.

RULE 29.6 STATEMENT

Respondent Mitsubishi Corporation is a corporation organized under the laws of Japan, has no parent corporation, and no publicly traded company owns 10% or more of its stock. Respondent Tucker Associates Inc. is a corporation organized under the laws of the State of Oregon, has no parent corporation, and no publicly traded company owns 10% or more of its stock.

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BRIEF IN OPPOSITION

Petitioner's first question broadly asks whether states can establish their own laws that must be followed by the federal courts. As stated, petitioner's question is overbroad, abstract and divorced from the facts in this case and the rulings by the lower courts. This first question raises no legitimate federal issue or any issue of genuine importance for this Court to decide. Indeed, as worded by petitioner, its first question masks the real issue in this case: whether the Court should grant review of the Ninth Circuit's affirmance of the district court's finding that there was no evidence of causation in a state law tort claim. It is self-evident that this issue is not appropriate for Supreme Court review.

Petitioner asserts that the Ninth Circuit's ruling on this state-law claim violated numerous constitutional provisions including the Full Faith and Credit Clause and the Seventh Amendment right to a jury trial. Significantly, petitioner did not raise any constitutional issues in the courts below. Further, any constitutional issues concocted by petitioner for Supreme Court review arising out of the fact-specific summary judgment ruling are wholly without merit. Notwithstanding petitioner's attempts to characterize it otherwise, this issue presents no question of genuine importance, does not involve any conflict among the circuits, raises no federal claim and is simply not certworthy.

Petitioner's other two questions fare no better. They address the jurisdictional scope of Section 2(c) of the Robinson-Patman Act. 15 U.S.C. § 13(c). In 1965, the Ninth Circuit, relying on a case construing Section 2(a) of the Robinson-Patman Act, held than an "effect" on commerce was sufficient to satisfy the "in commerce" jurisdictional requirement of Section 2(c) of the Act. *Rangen, Inc. v. Sterling Nelson & Sons*, 351 F.2d 851 (9th Cir. 1965). Nine years later, in 1974, the Court in *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186 (1974), held that the "in commerce" language of the first two prongs of Section 2(a) (which are identical to the first two

prongs in Section 2(c)) required more than an "effect on interstate commerce." *Gulf Oil*, 419 U.S. at 199. Hence, the legal underpinning of the *Rangen* decision was eviscerated by *Gulf Oil*.

Subsequent constructions of the "engaged in commerce" statutory language have likewise held that it is narrower than the "affecting commerce" or "involving commerce" language. *See e.g., Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). Based upon the post-*Rangen* authorities, the Ninth Circuit overruled *Rangen*, finding that "the jurisdictional analysis under section 2(c) of the Robinson-Patman Act is governed by the standard announced by the Supreme Court in *Gulf Oil*." Pet. App. 9a. The Ninth Circuit's ruling merely harmonized outdated Ninth Circuit law with the Court's more recent analysis of "engaged in commerce" language. There is no conflict among the circuits regarding this issue and there is no issue of great import that would be decided if this Court were to accept review.

STATEMENT OF THE CASE

This petition represents petitioner's final attempt to reverse the last adverse ruling in its unsuccessful trilogy of lawsuits against these respondents.[1/] Petitioner's two previous lawsuits against these respondents were also unsuccessful and petitioner has now either abandoned, or had judgment entered against it, on 18 separate claims in three different lawsuits. Pet. App. 4a. All

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[1/] See *Rotec Indus., Inc. v. Mitsubishi Corp.*, 36 F. Supp. 2d 810 (C.D. Ill. 1998), *aff'd*, 215 F.3d 1246 (Fed. Cir. 2000) (*"Rotec I"*); *Rotec Indus. Inc. v. Mitsubishi Corp.*, 179 F. Supp. 2d 885 (C.D. Ill. 2002) (*"Rotec II"*); *Rotec Indus. Inc. v. Mitsubishi Corp.*, 163 F. Supp. 2d 1268 (D. Or. 2001), *aff'd*, 348 F.3d 1116 (9th Cir. 2003) (*"Rotec III"*); *Rotec Indus. Inc. v. Mitsubishi Corp.*, 181 F. Supp. 2d 1173 (D. Or. 2002), *aff'd*, 348 F.3d 1116 (9th Cir. 2003) (*"Rotec III"*). In each case, upon respondents' filing of a motion for summary judgment, petitioner abandoned several of the claims originally alleged rather than respond to issues raised by the summary judgment motions on those claims.

of the lawsuits arose out of the Chinese government's decision to award supply contracts to multiple vendors for the concrete placement equipment to be used for the construction of the Three Gorges Dam in China, rather than to award petitioner an exclusive contract.

The Three Gorges Dam will be the largest hydroelectric dam in the world. Pet. App. 2a. The dam, a 17-year project, is being constructed in three stages and is expected to be completed in 2009. *Id.* Construction of the dam employs 25,000 people and requires the placement of 27,000,000 m^3 of concrete. The dam will span 1.2 miles across the Yangtze River.

In November, 1996, the Chinese Buyer, China Resources National Corporation[2/] awarded petitioner a contract for three tower crane mounted conveyor systems (Tower Belts) and, in December, 1996, awarded Mitsubishi Corporation[3/] a contract for two tower crane mounted conveyor systems (Top Belts). Pet. App. 3a. The crux of these lawsuits is that Petitioner

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[2/] China Three Gorges Dam Project Development Corporation ("CTGPC") was the "Owner" of the Project and China Resources National Corporation was the "Buyer" of the equipment. Originally the Buyer had been identified as China Resources (Holdings) Ltd., the parent company of China Resources National. At the time, all of these entities were owned by the Chinese Government.

[3/] Petitioner improperly fails to distinguish the conduct alleged against Mitsubishi and that alleged against the Tucker respondents and, indeed, collectively refers to the Tucker respondents and Mitsubishi as "Mitsubishi". Pet. 6. However, the only conduct specifically alleged against the Tucker respondents in the lower courts is with respect to one allegation in the tortious interference claim. The Tucker respondents provided design services to and on behalf of C.S. Johnson, an Illinois company that was originally to supply conveyors to Mitsubishi but which went bankrupt and was replaced by a Japanese company. The Tucker respondents were not a party to the Mitsubishi Contract and the Robinson-Patman Act claim is not directed against the Tucker respondents. Hence, throughout this brief, respondents specifically identify Mitsubishi as the relevant party and mention the Tucker respondents only where applicable.

believes it should have received a contract for the sale in China of all five Tower Belt/Top Belt systems.[4] None of the legal or factual issues raised by petitioner merit this Court's review.

A. The Bidding and Recommendation Process for the Three Gorges Concrete Conveyor Contract

In August, 1995, the CTGPC publicly announced that it was soliciting bids internationally for the concrete placement for Stage II construction at the Three Gorges Dam. The Bidding Documents and subsequent clarification documents indicated that there would be a substantial evaluation process conducted by a Bid Evaluation Committee to assess and compare the bids. The Bid Evaluation Committee was comprised of over 60 members and the bidders were to communicate and engage in clarification meetings with Committee members in connection with their proposed bids. Pet. App. 3a. The Evaluation Committee would then recommend proposals to the CTGPC, the decision making body. *Id.*

The proposals of the various bidders were submitted on January 15, 1996 in Yichang, China. Pet. App. 3a. After the Evaluation Committee reviewed and evaluated the bids, petitioner's and Mitsubishi's bids were both recommended by the Committee to CTGPC.[5] Pet. App. 11a. Over several months, the CTGPC engaged in negotiations in China with respect to the purchase of Tower Belts from petitioner and Top Belts from Mitsubishi. Pet. App. 3a, 11a. During the course of petitioner's and Mitsubishi's negotiations, both petitioner and Mitsubishi had numerous meetings and communications with members of the Evaluation Committee. Moreover, both petitioner and Mitsubishi had various "sources," including paid

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[4] It is undisputed that the Chinese had multiple suppliers for most of the important equipment for the dam such as cranes, turbines and generators.

[5] At least 7 other companies bid on providing concrete conveying systems, utilizing different types of equipment and methods. Pet. App. 3a.

consultants, that provided information to them. Indeed, petitioner utilized "friends" and "special channels" to keep informed regarding the status of the process. Throughout the process, petitioner was aware that CTGPC was also negotiating with Mitsubishi for the purchase of Top Belts.

B. The Contracts Awarded to Petitioner and Respondent Mitsubishi Corporation

On November 1, 1996, petitioner entered into a contract with China Resources National for three Tower Belts, two creter cranes and associated equipment and services for a total contract price of $30,515.319. Pet. App. 3a. On December 16, 1996, Mitsubishi entered into a contract with China Resources National in China for two Top Belt systems and associated equipment and services for a total price of $17,825,190.[6] *Id.*

Petitioner argues that a $2,000,000 price differential between the cost of Mitsubishi's two units and what two additional units purchased from Rotec would have cost, is evidence of wrongdoing. Pet. 7. Petitioner's representation, however, ignores the reality that this alleged "price differential" merely reflects a volume discount that both Mitsubishi and petitioner were required to include under the Bidding Documents – *i.e.* the more units China Resources National purchased from either petitioner or Mitsubishi, the lower the price per unit. This "volume discount" is what petitioner is relying on for its claim that the two Mitsubishi units cost $2,000,000 more than petitioner's units would have cost had China Resources National purchased the two additional units

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[6] The Mitsubishi Contract was a foreign transaction: the Contract was negotiated entirely in China; the Contract was executed in Hong Kong; the Buyer was a Chinese entity and the Seller, Mitsubishi Corporation, was a Japanese Corporation; the Contract was governed by Chinese law; the Contract provided for the concrete placement equipment to be supplied from Japan, France and China; and the Contract required the equipment to be delivered and assembled in China.

from petitioner. In fact, had China Resources National bought all five units from Mitsubishi rather than petitioner, the Buyer could have paid a total of almost $2 million *less* (*i.e.* approximately $32.8 million to Mitsubishi versus $34.6 million to petitioner). As with other significant equipment, however, the Buyer elected not to sole source these systems—the equipment required to place the concrete on the world's largest dam—either from Mitsubishi or petitioner.

C. The 0.5% Addendum to the Mitsubishi Contract

Finally, petitioner's characterization of a "secret" commission payment by Mitsubishi to the Chinese Buyer, is disingenuous. Pet. 14. Shortly before the execution of the final December 16, 1996 Contract for the purchase of two Top Belts from Mitsubishi, China Resources National (the "Buyer"), requested that Mitsubishi provide a "commission" payment to the Buyer. The "commission" payment of 0.5% of the $17.8 million contract price, or $89,126, was disclosed and memorialized in a written Addendum to the Contract, which indicated that it "forms an integral part of the Contract."[7/] Pet. App. 4a, 19-20a.

The final terms of the Addendum were negotiated on December 16, 1996, the date both the Contract and the Addendum were executed. At the time the Addendum was negotiated, the material terms of Mitsubishi's Contract had been finalized. Further, the Addendum payment was not due until Mitsubishi had been paid in full under the Contract. Pet. App. 19a-20a. As of May 25, 2000, four years after the execution of

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[7/] Petitioner has claimed that the payment was "secret" because Mitsubishi did not advise its Consortium partner, Potain, or C.S. Johnson, one of its suppliers, about the Addendum. However, the Addendum was in writing and part of the Mitsubishi Contract, to which Potain and C.S. Johnson were not contracting parties. This payment had no effect on monies due Potain or C.S. Johnson as it came out of Mitsubishi's revenue, not that of Potain or C.S. Johnson. In fact, C.S. Johnson was not even a member of the Mitsubishi/Potain Consortium.

the Contract and the Addendum, Mitsubishi had not yet been paid in full and, therefore, the Addendum payment had not yet been made to the Buyer. The 0.5% Addendum payment was to be paid to a Bank of China Hong Kong account of the Buyer but in the name of another Chinese Government owned entity, China Resources Machinery Corp., a sister corporation, and not to any individual.[8/] Pet. 20a.

It is this payment that petitioner alleges was "improper," and a violation of Section 2(c) of the Robinson-Patman Act. Pet. 14. Further, petitioner has requested numerous courts to infer, in the absence of any evidence of causation, that the Addendum payment to a Chinese Government entity caused Mitsubishi to receive the contract for the two Top Belt systems and Rotec not to receive an exclusive contract from the Chinese Government.[9/] No court has been willing to make such an inference in the absence of any supporting evidence.

OPINIONS BELOW

On September 14, 2001 the district court in Oregon granted respondents' motion for summary judgment on petitioner's federal RICO claims and Robinson-Patman Act claims. Pet. App. 14a-38a. With respect to the Robinson-Patman Act claims, the district court held that the Supreme Court's decision in *Gulf*

[8/] Like China Resources National, China Resources Machinery was also a subsidiary of the originally contemplated Buyer, China Resources (Holdings), Ltd.

[9/] The third wrongful act of *Mitsubishi* asserted by petitioner in its petition, is Petitioner's claim that *Mitsubishi* offered a quality control position to a member of the Evaluation Committee. This is inaccurate. It had been alleged that C.S. Johnson, through its representative, Tucker Associates, allegedly offered the quality control position to an individual during *Stage I* of the project, before Mitsubishi had been in contact with C.S. Johnson (or Tucker) with respect to any relationship at Three Gorges. Pet. App. 43a-45a. Mitsubishi had absolutely nothing to do with any alleged job offer. There was no disputed issue of fact in this regard.

Oil disavowed an "effect on commerce" test as the jurisdictional prerequisite for a Robinson-Patman claim and, therefore the 1965 precedent of *Rangen* was no longer good law. Pet. App. 30a.

The district court also noted that the parties had relied on the assumption that if the federal claims failed, the state tort claim would also fail and specifically noted that the parties "may not have raised all possible arguments against the tort." Pet. App. 37a. As a result, respondents requested an opportunity to more fully address the state law claim and the court agreed. Pet. App. 41a. Respondents filed a second motion for summary judgment directed to the remaining state law claim which was granted on February 1, 2002. Pet. App. 39a-53a. The district court granted respondents' motion on the basis that petitioner had not come forward with any evidence of causation:

> There is *no evidence* of how defendants' allegedly wrongful conduct affected China Resources National's purchase decisions. Backing up a few steps, there is *no evidence* of how the conduct affected the Bid Evaluation Committee, *no evidence* of what the Bid Evaluation Committee recommended, *no evidence* on who made the final decision, and *no evidence* on whether the final decision maker accepted the recommendation of the Bid Evaluation Committee. *The required inference is too great to make.*

Pet App. 50a (emphasis added).

The Ninth Circuit affirmed both summary judgment rulings applying the same reasoning as the district court.[10/] The Ninth Circuit agreed that petitioner had not come forward with any facts demonstrating causation and that "too many inferences need to be drawn to establish a connection between that

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[10/] Petitioner did not appeal the summary judgment rulings in respondents' favor on the RICO claims.

improper conduct and Rotec's ultimate failure to secure the two contracts won by Defendants." Pet. App. 11a. With respect to the Robinson-Patman Act claim, the Ninth Circuit overruled *Rangen* in light of *Gulf Oil* and *Circuit City* and found that Section 2(c) of the Robinson-Patman Act requires more than an "effect on commerce." Hence, the Addendum payment in Hong Kong was not enough to satisfy the jurisdictional "in commerce" requirement of Section 2(c) in the first instance.

REASONS FOR DENYING THE PETITION

The petitioner fails to satisfy any of the Court's criteria for a grant of certiorari. Petitioner's fabricated constitutional issues in connection with its state law claim were not pressed or passed upon below. Further, whether there was sufficient evidence from which causation could be inferred is a narrow, fact-specific issue and has no impact beyond this particular case. Thus, a decision on the merits would be of no value with respect to any other cases.

Petitioner's other questions presented, which address whether the Ninth Circuit correctly overturned its nearly 40-year-old precedent, also do not present any certworthy issues. There is no conflict among the circuits on the jurisdictional scope of Section 2(c) and the Ninth Circuit merely brought its law into line with this Court's decisions since 1965, when *Rangen* was decided. The petitioner raises no issues that merit this Court's attention with respect to Section 2(c) of the Robinson-Patman Act.

I. THE NINTH CIRCUIT'S AFFIRMANCE OF SUMMARY JUDGMENT ON PETITIONER'S TORTIOUS INTERFERENCE CLAIM RAISES NO FEDERAL ISSUE

A. The Alleged Constitutional Issues Regarding Petitioner's Tortious Interference Claim Were Not Pressed Or Passed Upon Below.

Petitioner did not raise any federal or constitutional issue regarding the tortious interference claim either in the district court or in its briefing on the merits in the Ninth Circuit. In its petition for rehearing filed in the Ninth Circuit, petitioner, for the first time, argued that the Ninth Circuit's failure to address an Oregon Appeals court decision "threatens to undermine well-established Oregon law and the Constitutional right to trial by jury under the Seventh Amendment of the United States Constitution and Article VII, Section 3 of the Oregon Constitution." Rehearing Pet. 4. There was no further citation, discussion or analysis of this "constitutional" issue in the Ninth Circuit. On its face, it is evident that there is no meritorious federal issue raised by the Ninth Circuit's conclusion that petitioner had not come forward with sufficient evidence of causation to avoid summary judgment.

Further, neither petitioner's Full Faith and Credit argument nor its Tenth Amendment argument were raised at all in the lower courts, nor even vaguely alluded to in its petition for rehearing.[11/] Accordingly, none of the "constitutional" issues regarding the propriety of summary judgment on causation in a state law claim were "pressed or passed upon below" and should not be considered for the first time here. *Bankers Life &*

[11/] Petitioner's reliance on the decision in *West v. American Tel. & Tel. Co.*, 311 U.S. 223 (1940), for the proposition that the Ninth Circuit ignored Oregon law, is misplaced. *See* Pet. 15-16. The lower courts did not ignore or reject Oregon law; it was applied as interpreted by the district court and the Ninth Circuit.

Casualty Co. v. Crenshaw, 486 U.S. 71 (1988); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990); *United States v. Williams*, 504 U.S. 36 (1992). However, even if these arguments had been considered, petitioner still cannot demonstrate that any certworthy issues are raised by the Ninth Circuit's affirmance of summary judgment in respondents' favor.

B. The Ninth Circuit's Decision Does Not Implicate Any Federal Issues And Merely Affirmed That There Was Insufficient Evidence Of Causation To Present To A Jury

The Ninth Circuit's affirmance of summary judgment on a tortious interference with prospective advantage claim raises no issue that merits attention by this Court. Petitioner urges this Court to grant its petition based on its view that Oregon law provides that causation is always a question for the jury. Pet. 8-9. Petitioner argues (at 12-13, 18) that by finding insufficient evidence to go forward on the causation element, the district court and the Ninth Circuit have acted contrary to Oregon law and denied petitioner its right to a jury trial under the Seventh Amendment and the Oregon Constitution. This Court has long recognized that summary judgment does not violate the Seventh Amendment. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 336 (1979) (citing *Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 319-321 (1902)). Petitioner's argument, that the granting of summary judgment violates its constitutional right to a jury trial, is untenable. The petition is nothing more than a transparent attempt to convert a purely state law issue to one of constitutional magnitude and should be rejected.

The Ninth Circuit held that there were no facts demonstrating a link between China Resources National's decision not to award petitioner the contract for the additional

units and any conduct of respondents.[12/] Pet. App. 11a-12a. This ruling is fact-specific and raises no federal or constitutional issue.

The causation element is subject to the same summary judgment standards as the other elements of petitioner's claim. To establish causation under Oregon law, petitioner must come forward with some evidence that *but for* Mitsubishi's conduct, Petitioner would have been awarded the exclusive supply contract for the Tower Belts. *Northwest Natural Gas Co. v. Chase Gardens, Inc.*, 982 P.2d 1117, 1126 (Or. 1999). In opposing summary judgment, petitioner must come forward with "specific facts" showing that there is a genuine issue for trial with respect to the causation issue. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Here, the Ninth Circuit affirmed that petitioner had not come forward with such facts or evidence "that could lead a rational trier of fact to conclude that defendants' unlawful payment caused defendants to receive the contract from the Chinese government parties." Pet. App. 12a.

Petitioner complains that the Ninth Circuit misapplied Oregon law by not relying on the decision in *Kalgaard v. Lindo Mar Adventure Club*, 934 P.2d 637 (Or. 1997). In *Kalgaard*, the court held that "[i]f the record contains facts that create a *plausible inference* that a person's statements about his or her conduct are not true, summary judgment is inappropriate." *Id.*

[12/] Petitioner repeatedly contends that the Ninth Circuit "presumed" all other elements and that respondents engaged in wrongful conduct. Pet. 8. However, the Ninth Circuit, like the District Court "assumed," not *presumed* the other elements, solely for purposes of ruling on the summary judgment, not as a factual determination. Pet. App. 11a, 49a. In fact, respondents have consistently maintained that there is insufficient evidence to support all the other elements as well and petitioner's characterizations are hotly contested. Respondents contend that none of the conduct alleged by petitioner was improper. Because of the complete lack of evidence of causation, neither the district court nor the Ninth Circuit needed to address the sufficiency of the evidence with respect to the other elements.

at 640 (emphasis added). This is a far cry from holding that summary judgment can never be granted when causation is the only disputed issue as argued by petitioner. Pet. 15. Consistent with general summary judgment principles, the court in *Kalgaard* simply held that if plausible inferences can be drawn in the nonmovant's favor, summary judgment is not appropriate.

Despite an expressed intention to do so, petitioner never sought any discovery from the Chinese Buyer, any representative of CTGPC or the Three Gorges Evaluation Committee. Both the Ninth Circuit and the district court correctly concluded that the inferences petitioner was urging them to draw regarding causation were not plausible or justifiable. Pet. App. 11a, 50a. Petitioner has raised nothing more than a disagreement with how the federal courts applied Oregon law. There is simply no aspect of these rulings that rises to a constitutional level warranting review by this Court or that present any issue meriting this Court's attention.

II. THE QUESTIONS WHETHER, UNDER *GULF OIL*, THE "IN COMMERCE" LANGUAGE IN SECTION 2(c) OF THE ROBINSON-PATMAN ACT REQUIRES MORE THAN AN "EFFECT ON COMMERCE" DOES NOT RAISE A SIGNIFICANT ISSUE.

A. The *Rangen* Conclusion That The "In Commerce" Language In Section 2(c) Of The Robinson Patman Act Only Requires An Effect On Commerce Was Overruled By *Gulf Oil*

Petitioner asserts that the Ninth Circuit incorrectly overturned its own 1965 decision in *Rangen* regarding the jurisdictional scope of Section 2(c) of the Robinson-Patman Act. Petitioner bases this argument on its contention that the decision in *Gulf Oil*, which construed Section 2(a) of the Act, has no

relevance to an interpretation of Section 2(c).[13] Pet. 19-22. Petitioner's position does not raise any issue of genuine importance and lacks merit.

Section 2(c) of the Robinson-Patman Act provides, in pertinent part:

> It shall be unlawful for any person *engaged in commerce, in the course of such commerce*, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods . . . either to the other party to such transaction or to an agent . . . .

15 U.S.C. § 13(c) (emphasis added).[14]

Section 2(a) of the Act begins with the identical phrase as Section 2(c): "It shall be unlawful for any person *engaged in commerce, in the course of such commerce* . . . ." 15 U.S.C. §

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[13] This argument also ignores the reality of Robinson-Patman jurisprudence in which Section 2(c) has frequently been interpreted with reference to Section 2(a), including in *Rangen*. The additional limitation in Section 2(a) does not change the scope or effect of the first two prongs, which are present not only in Section 2(a) and Section 2(c), but in Section 2(d) of the Robinson-Patman Act and Section 3 of the Clayton Act. Indeed, this is precisely why courts have historically relied on cases addressing Sections 2(a), (c), (d), (e) and Section 3 of the Clayton Act to interpret the identical provisions in these sections. *See, e.g. Rangen*, 351 F.2d 851 (9th Cir. 1965) (interpreting 2(c) based upon 2(a) authorities); *McCormack v. Theo. Hamm Brewing Co.*, 284 F. Supp. 158 (D. Minn. 1968) (Robinson-Patman Act Section 2(a) and Clayton Act Section 3).

[14] While the scope of Section 2(c) read in the abstract would be extremely broad, Section 2(c) does not prohibit *all* negotiated price reductions or concessions from a seller to a buyer. *Augusta News Co. v. Hudson News Co.*, 269 F.3d 41, 46 (1st Cir. 2001).

13(a) (emphasis added). It is the construction of this language that is at issue here.

In *Rangen*, a Section 2(c) case, the Ninth Circuit concluded that payments made in an intrastate transaction which gave an advantage to the payor in its interstate business "must be regarded as having been made in the course of . . . interstate commerce" because of an "effect" on commerce.[15/] 351 F.2d at 861. This conclusion was based on *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954), a Section 2(a) case. *Rangen*, 351 F.2d at 860-862. However, in *Gulf Oil*, decided nine years after *Rangen* and twenty years after *Moore*, the Court disavowed this interpretation of *Moore* and noted that *Moore* was concerned with the scope of Congress' commerce power, *i.e.*, whether "Congress . . . has power to reach the local activities of a firm that finances its predatory practices through multistate operations." *Gulf Oil*, 419 U.S. at 201 n.17. *Moore* was not concerned with the jurisdictional requirement of Section 2(a), and, in fact, the *Gulf Oil* Court noted that Mead had interstate sales and would satisfy the jurisdictional requirement. *Id.*

In *Gulf Oil*, the Court expressly rejected the "nexus to commerce" theory relied upon by *Rangen* and petitioner and held that it did not apply to the "in commerce" language of the Robinson-Patman Act. The Court noted that

> the distinct 'in commerce' language of the Clayton and Robinson-Patman Act provisions with which we are concerned here appears to denote *only persons or activities within the flow of interstate commerce* — the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer. *If this is so,*

[15/] Significantly, here, the alleged wrongful conduct does not involve "interstate sales," only a contractual obligation to make a payment in the future by a Japanese company to a Chinese company in Hong Kong. Pet. App. 10a.

> *the jurisdictional requirements of these provisions cannot be satisfied merely by showing that allegedly anticompetitive acquisitions and activities affect commerce.*

Gulf Oil, 419 U.S. at 195 (emphasis added).

The Court rejected the argument that the language of the Robinson-Patman Act "should be held to extend, as does § 1 of the Sherman Act, to all persons and activities that have a substantial effect on interstate commerce." *Id.* at 199. An "effect on commerce" does not satisfy the jurisdictional prerequisites of Section 2(c).[16/]

Contrary to petitioner's arguments (at 20-23), this discussion in *Gulf Oil* concerned the first two prongs of the jurisdictional requirements of Section 2(a), which, as noted, are identical to the jurisdictional requirements in Section 2(c). Hence, cases addressing this particular phrase under Section 2(a) are applicable in interpreting this same phrase in Section 2(c).[17/] It is a fundamental interpretative principle that identical words or terms used in different parts of the same act are intended to have the same meaning. *Commissioner v. Lundy,* 516 U.S. 235, 250 (1996); *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995).

This Court has recently reaffirmed that the phrase "engaged in commerce" is "a term of art, indicating a limited assertion of

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[16/] In essence, the "effect on commerce" according to petitioner is that it lost the sale in China of the two additional units. Pet. 7, 21, 23.

[17/] Not only is there no conflict among the Circuits on this issue, but the only other case to directly address the issue of the applicability of *Gulf Oil* to Section 2(c) of the Robinson-Patman Act is consistent with respondents' position and also found that an "effect on commerce" was not enough. *Rohrer v. Sears, Roebuck & Co.*, 1975 WL 899, at *1 (E.D. Mich. Mar. 31, 1975) (plaintiffs' argument "seeks to extend the interpretation of the scope of the Sherman Act's coverage to the coverage of the Robinson-Patman Amendment to the Clayton Act. This approach has been rejected, however, . . . by the Supreme Court in *Gulf Oil* . . . .").

federal jurisdiction." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 116 (2001).[18] The phrase "engaged in commerce" in Section 7 of the Clayton Act "means engaged in the flow of interstate commerce, and was not intended to reach all corporations engaged in activities subject to the federal commerce power." *Id.* at 117. In *Circuit City*, the Court noted that in *Gulf Oil* "[t]he plain meaning of the words 'engaged in commerce' is narrower than the more open-ended formulations 'affecting commerce' and 'involving commerce.'" *Id.* at 118 (citing *Gulf Oil*, 419 U.S. at 195). The Court's more recent analysis of the relevant "engaged in commerce" language further supports Mitsubishi's position that an "effect on commerce" is not enough to satisfy Section 2(c)'s jurisdictional requirement and, therefore, the Ninth Circuit correctly overruled *Rangen* on this point.

B. There Is No Conflict That Section 2(c) Of The Robinson-Patman Act Requires That The Improper Conduct Occur In Commerce.

Petitioner also incorrectly contends (at 21) that there is an absence of any language in Section 2(c) requiring that the prohibited conduct occur within the "flow of commerce" and, therefore, Congress did not intend Section 2(c) to be so limited. However, this argument ignores the express language of the relevant provisions which do in fact require that the prohibited conduct occur "in the course of such commerce." 15 U.S.C. § 13(c) ("It shall be unlawful for any person engaged in commerce, *in the course of such commerce*, to pay . . . .").

Indeed, in *Gulf Oil*, the Court held that the "unlawful activity" itself, which in *Gulf Oil* was the exclusive dealing

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[18] In *Circuit City*, the Court was concerned with the meaning of the "engaged in commerce" language in Section 1 of the Federal Arbitration Act. In its analysis, the Court reviewed the interpretation of this phrase as used in a variety of statutes, including § 2(a) of the Robinson-Patman Act. *Circuit City*, 532 U.S. at 117-118.

arrangement, had to occur in the course of petitioner's interstate activities. 419 U.S. at 195. Contrary to petitioner's contention (at 20), this analysis was *in addition* to the Court's discussion of the third prong, where the Court noted that at least one of the petitioner's allegedly discriminatory sales had to have been made in interstate commerce. 419 U.S. at 195.

The Ninth Circuit also correctly concluded that "Section 2(c) provides that the unlawful payment must occur 'in the course of' commerce." Pet. App. 10a. Here, the alleged "prohibited" conduct, the 0.5% Addendum agreed to in writing between Mitsubishi and China Resources National, occurred entirely overseas in connection with a Chinese transaction between a Chinese entity and a Japanese corporation. Pet. App. 10a. Petitioner attempts to extend the provisions of Section 2(c) to foreign conduct simply because there now exists a global economy and U.S. companies must compete internationally. Pet. 12. However, Acts of Congress do not have extraterritorial application "unless such an intent is clearly manifested." *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993).

There is nothing in the legislative history of Section 2(c) or any of its application that would support petitioner's position that it should apply to a foreign transaction such as the 0.5% Addendum.

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In the final analysis, petitioner does not present any issue of genuine importance that merits this Court's review. Petitioner's attempt to convert a purely state law and fact-specific issue, *i.e.*, whether there was sufficient evidence of causation to avoid summary judgment, into a constitutional question, is nothing more than an attempt to manufacture a certworthy issue where clearly none exists. Petitioner's arguments with respect to the jurisdictional scope of Section 2(c) of the Robinson-Patman Act do not raise any issue over which there is a conflict of authority. In fact, the Ninth Circuit's ruling merely brought the Ninth

Circuit law in accord with this Court's jurisprudence. Review of this case will not resolve any outstanding issue and there is no question of great import warranting attention by this Court.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

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